



TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY  
represented by the Presidency and the Vice-Presidency of the Energy Community

## REASONED REQUEST

in Case ECS-9/23

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter: "the Treaty") and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: "Dispute Settlement Procedures"),<sup>1</sup> the

### SECRETARIAT OF THE ENERGY COMMUNITY

against

### THE REPUBLIC OF SERBIA

is seeking a Decision from the Ministerial Council that

by maintaining the operation of TPP Morava after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), the Republic of Serbia fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

The Secretariat of the Energy Community submits the following Reasoned Request to the Ministerial Council.

#### I. Relevant Facts

##### 1. Introduction

- (1) The present case concerns non-compliance of the Republic of Serbia with the provisions of Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants<sup>2</sup> (hereinafter: "Directive 2001/80/EC") by not respecting its provisions on limited lifetime derogation (also known as "opt-out") stipulated in Article 4(4) thereof. According to that provision, as adapted for the Energy Community, large combustion plants subject to it can only be operated for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023. Following the expiry of this period

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<sup>1</sup> Procedural Act No 2015/04/MC-EnC of 16 October 2015.

<sup>2</sup> OJ L 309, 27.11.2001, p. 1.

or, in any event, from 1 January 2024 onwards, plants subject to Article 4(4) of Directive 2001/80/EC can only remain in operation if their emissions are in line with the limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (hereinafter: "Directive 2010/75/EU").<sup>3</sup>

## 2. Background

- (2) Directive 2001/80/EC forms part of the Energy Community environmental *acquis communautaire* since the signature of the Treaty in 2005. The purpose of the Directive is to combat air pollution by reducing emissions of sulphur dioxide, nitrogen oxides and dust from large combustion plants. These pollutants are significant contributors to emissions into the air and the negative consequences thereof, such as acidification, eutrophication, and ground-level ozone.
- (3) According to point 3 of Annex II of the Treaty, each Contracting Party must have implemented Directive 2001/80/EC by 31 December 2017.
- (4) On 24 October 2013, the Ministerial Council adopted Decision 2013/05/MC-EnC on the implementation of Directive 2001/80/EC (hereinafter: "Decision 2013/05/MC-EnC"), whereby Directive 2001/80/EC was adapted for the specific needs of the Energy Community. Namely, Decision 2013/05/MC-EnC introduced amendments for the implementation of Article 4(4) of Directive 2001/80/EC in the Energy Community and specified the timeframes of its applicability for large combustion plants in the Contracting Parties.
- (5) On 14 October 2016, the Ministerial Council adopted Decision 2016/19/MC-EnC on authorising exemptions of plants from compliance with the emission limit values set by Directive 2001/80/EC. As stipulated in its Article 1(1), this decision lists the plants that may be exempted from compliance with the emission limit values referred to in Article 4(3) of Directive 2001/80/EC, thereby complementing the opt-out rules stipulated in Article 4(4) of Directive 2001/80/EC for the purposes of the Energy Community. TPP Morava, operated by the public utility Elektroprivreda Srbije (hereinafter "EPS") was included in the list established by Decision 2016/19/MC-EnC.<sup>4</sup>
- (6) Following the expiry of the implementation deadline of Directive 2001/80/EC in the Energy Community, the Secretariat requested the Contracting Parties concerned by Decision 2016/19/MC-EnC to confirm whether the plants in question have started to operate under the opt-out regime. In response to a letter sent by the Secretariat on 15 February 2018,<sup>5</sup> the Ministry of Mining and Energy of the Republic of Serbia (hereinafter: "the Ministry") confirmed the start of the opt-out of TPP Morava by a letter sent on 28 February 2018.<sup>6</sup>
- (7) The Republic of Serbia submitted its emissions and plant operation data, as required by Annex VIII.B of Directive 2001/80/EC for the reporting years 2018-2025 on an annual basis. According to the reports, the situation with regard to the operational hours used by TPP Morava between 2018 and 2025 presents itself as follows:

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<sup>3</sup> OJ L 334, 17.12.2010, p. 17.

<sup>4</sup> Decision 2016/19/MC-EnC (ANNEX 1), p. 4, row no. 6.

<sup>5</sup> Ref. SR/MIN/O/jko/05/15-02-2018 (ANNEX 2).

<sup>6</sup> Ref. no. 337-00-00041/2018-07 (ANNEX 3).

| 2018  | 2019  | 2020  | 2021  | 2022  | 2023  | 2024  | 2025  | Total  |
|-------|-------|-------|-------|-------|-------|-------|-------|--------|
| 4,421 | 4,553 | 4,773 | 3,219 | 6,085 | 3,867 | 2,998 | 2,875 | 32,791 |

- (8) TPP Morava has therefore reached the end of the 20,000-hours long opt-out period already in the 2022 reporting year, at the end of which it stood by 23,051 hours. The plant has nevertheless continued its operation in the 2023–2025 reporting years. Thereby the excess of 3,051 operational hours by 31 December 2022 was exacerbated by further 9,740 operational hours, raising the total amount of operational hours spent in breach of the provisions of Directive 2001/80/EC to 12,791. This equals to 164% the total amount of operational hours available for opt-out under Article 4(4) of Directive 2001/80/EC. The plant remains in operation up until the present day.

### 3. Legal framework governing emissions into the air from large combustion plants in the Republic of Serbia

- (9) In the Republic of Serbia, the Law on Air Protection<sup>7</sup> and the Decree on the Emission Limit Values of Pollutants into the Air from Combustion Plants (hereinafter: “the Decree”)<sup>8</sup> regulate the operation of, as well as the emissions into the air from large combustion plants. The emission limit values stipulated by Annexes III to VII of Directive 2001/80/EC are transposed in line with the Energy Community *acquis communautaire* by the Decree.
- (10) Article 6 of the Decree fully and correctly transposed Article 4(4) of Directive 2001/80/EC. This article of the Decree clearly stipulates that in case plants that were subjected to the opt-out regime have reached the 20,000 operational hours limit between 1 January 2018 until 31 December 2023 or, in any event, if they continue to work after 1 January 2024, their emissions shall be in compliance with the emission limit values from Annex 2 C)<sup>9</sup>.
- (11) The legal framework for the correct implementation of Article 4(4) of Directive 2001/80/EC is therefore fully in place in the Republic of Serbia and is in line with the Energy Community *acquis communautaire* on environment.

## II. Relevant Energy Community Law

- (12) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]”. A violation of Energy Community Law occurs if “[a] Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law”.<sup>10</sup>
- (13) Point (d) of Article 2(1) of the Treaty reads:

<sup>7</sup> Previously Official Gazette of the Republic of Serbia, No. 36/09, 10/13 and 26/21. The new Law on Air Protection was adopted in June 2025 (Official Gazette of the Republic of Serbia, No. 51/25).

<sup>8</sup> Official Gazette of the Republic of Serbia, No. 6/16 and 67/21.

<sup>9</sup> Annex 2 C) of the Decree provides the emission limit values compliant with those of Directive 2010/75/EU.

<sup>10</sup> Article 3(1) of the Dispute Settlement Procedures.

*The task of the Energy Community shall be to organise the relations between the Parties and create a legal and economic framework in relation to Network Energy, as defined in paragraph 2, in order to: (...)*

*(d) improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space*

(14) Article 6 of the Treaty reads:

*The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*

(15) Article 12 of the Treaty reads:

*Each Contracting Party shall implement the *acquis communautaire* on Environment in compliance with the timetable for the implementation of those measures set out in Annex II.*

(16) Article 16 of the Treaty reads:

*The "acquis communautaire on environment", for the purpose of this Treaty, shall mean (...)*

*(iii) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants,<sup>11</sup> (...)*

(17) Article 94 of the Treaty reads:

*The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.*

(18) Point 3 of Annex II to the Treaty reads:

*Each Contracting Party shall implement Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants by 31 December 2017.*

(19) Point 5 of Annex II to the Treaty reads:

*Each Contracting Party shall implement Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) from 1 January 2018 for new plants. For existing plants, Contracting Parties shall implement those provisions by 1 January 2028 at the*

<sup>11</sup> As amended by Decision 2013/05/MC-EnC and by Decision 2015/07/MC-EnC on amending Decision 2013/05/MC-EnC.

latest. Prior to that date, they shall endeavour to implement the provisions of Chapter III and Annex V within the shortest possible timeframe, in particular in the cases of retrofitting existing plants. (...)

- (20) Article 2(9) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community<sup>12</sup> reads:

*“existing plant” means any combustion plant for which the original construction licence or, in the absence of such a procedure, the original operating licence was granted before 1 July 1992.*

- (21) Article 4(4) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community<sup>13</sup> reads:

*With the exception of plants for which a date of closure prior to 1 January 2018 has been agreed by the authorities via bilateral agreements with the European Union or other international organisations, existing plants may be exempted from compliance with the emission limit values referred to in paragraph 3 and from their inclusion in the national emission reduction plan on the following conditions:*

*(a) the operator of an existing plant undertakes, in a written declaration submitted by 31 December 2015 at the latest to the competent authority, not to operate the plant for more than 20 000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023;*

*(b) the Ministerial Council, in the form of a decision and following a verification by the Secretariat that the above conditions are met, authorizes this exemption in the form of a decision approved by the majority of its members including a vote in favour by the European Union.*

*The operator is required to submit each year to the competent authority a record of the used and unused time allowed for the plants’ remaining operational life. Contracting Parties are required to submit each year a summary of these reports to the Secretariat.*

*From the point in time when the plant has been operating for 20 000 hours since 1 January 2018 and in any case from 1 January 2024 onwards, the plant shall not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.*

- (22) Part 2 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community<sup>14</sup> reads:

*1. All emission limit values shall be calculated at a temperature of 273,15 K, a pressure of 101,3 kPa and after correction for the water vapour content of the waste gases and at a standardised O<sub>2</sub> content of 6 % for solid fuels, 3 % for combustion plants other than gas turbines and gas engines using liquid and gaseous fuels and 15 % for gas turbines and gas engines.*

*In case of combined cycle gas turbines with supplementary firing, the standardised O<sub>2</sub> content may be defined by the competent authority, taking into account the specific characteristics of the installation concerned.*

<sup>12</sup> Ministerial Council Decision 2013/05/MC-EnC.

<sup>13</sup> Ministerial Council Decision 2013/05/MC-EnC.

<sup>14</sup> Ministerial Council Decision 2013/06/MC-EnC.

2. Emission limit values ( $\text{mg}/\text{Nm}^3$ ) for  $\text{SO}_2$  for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

| Total rated thermal input (MW) | Coal and lignite and other solid fuels                                    | Biomass | Peat                                           | Liquid fuels |
|--------------------------------|---------------------------------------------------------------------------|---------|------------------------------------------------|--------------|
| 50-100                         | 400                                                                       | 200     | 300                                            | 350          |
| 100-300                        | 200                                                                       | 200     | 300<br>250 in case of fluidised bed combustion | 200          |
| > 300                          | 150<br>200 in case of circulating or pressurised fluidised bed combustion | 150     | 150<br>200 in case of fluidised bed combustion | 150          |

(...)

4. Emission limit values ( $\text{mg}/\text{Nm}^3$ ) for  $\text{NO}_x$  for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

| Total rated thermal input (MW) | Coal and lignite and other solid fuels              | Biomass and peat | Liquid fuels |
|--------------------------------|-----------------------------------------------------|------------------|--------------|
| 50-100                         | 300<br>400 in case of pulverised lignite combustion | 250              | 300          |
| 100-300                        | 200                                                 | 200              | 150          |
| > 300                          | 150<br>200 in case of pulverised lignite combustion | 150              | 100          |

(...)

7. Emission limit values ( $\text{mg}/\text{Nm}^3$ ) for dust for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

| Total rated thermal input (MW) |                               |
|--------------------------------|-------------------------------|
| 50-300                         | 20                            |
| > 300                          | 10<br>20 for biomass and peat |

- (23) Point 2 of Part 5 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community<sup>15</sup> reads:

*2. Minimum rate of desulphurisation for combustion plants referred to in Article 30(3)*

| Total rated thermal input (MW) | Minimum rate of desulphurisation |
|--------------------------------|----------------------------------|
| 50-100                         | 93 %                             |
| 100-300                        | 93 %                             |
| > 300                          | 97 %                             |

### III. Preliminary procedure

- (24) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. As stipulated in Article 12 of the Dispute Settlement Procedures, the Secretariat initiates a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these Rules, such a procedure is initiated by way of an Opening Letter. According to Article 14 of the same Rules, in the light of the reply or absence of a reply from the Party concerned, the Secretariat may address a Reasoned Opinion to that Party. In the light of the reply or absence of a reply from the Party concerned by the Reasoned Request, the Secretariat may bring the matter to the attention of the Ministerial Council by way of a Reasoned Request in accordance with Article 29 of the Dispute Settlement Procedures.
- (25) After the Secretariat has repeatedly recalled the approaching non-compliance with the provisions of Directive 2001/80/EC,<sup>16</sup> the present case was initiated on 20 October 2023. In the Opening Letter,<sup>17</sup> the Secretariat preliminarily concluded that the Republic of Serbia, by maintaining the operation of TPP Morava after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Directive 2010/75/EU, fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC. The Secretariat

<sup>15</sup> Ministerial Council Decision 2013/06/MC-EnC.

<sup>16</sup> Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, pp. 162–163; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, pp. 174–175; Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 168–169; Annual Implementation Report of the Energy Community Secretariat, 1 November 2022, pp. 154–155.

<sup>17</sup> ANNEX 4.

requested the Government of the Republic of Serbia to submit its reply on the points of fact and of law raised in the Opening Letter by 20 December 2023.

- (26) On 18 December 2023, the Ministry sent a Reply to the Opening Letter to the Secretariat.<sup>18</sup>
- (27) As the information and the legal arguments provided by the Reply to the Opening Letter did not dispel the concerns raised in the Opening Letter, the Secretariat issued a Reasoned Opinion on 30 March 2026 and requested the Government of the Republic of Serbia to submit its reply on the points of fact and of law raised therein by 30 May 2026.<sup>19</sup>
- (28) On 29 May 2026, the Ministry sent a Reply to Reasoned Opinion.<sup>20</sup>
- (29) As will be argued below, the Secretariat considers that the Republic of Serbia did not provide sufficient evidence of developments or arguments that would dispel the concerns raised in the Opening Letter and concluded in the Reasoned Opinion. Therefore, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council.

#### IV. Legal Assessment

- (30) The present Reasoned Request addresses the non-compliance of the Republic of Serbia with the obligation to operate large combustion plants subject to Article 4(4) of Directive 2001/80/EC for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023, or to comply with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.<sup>21</sup>
- (31) As a Contracting Party to the Treaty, the Republic of Serbia is under an obligation to implement, *i.e.* to transpose and to apply the *acquis communautaire* on environment, including Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, and Directive 2010/75/EU, as adapted for and adopted by the Energy Community by Decision 2013/06/MC-EnC, as referred to in Article 12 of the Treaty and defined by Annex II thereof. Point 3 of Annex II to the Treaty establishes the general implementation deadline for Directive 2001/80/EC as 31 December 2017 and point 5 of Annex II to the Treaty establishes the general implementation deadline for Directive 2010/75/EU as 1 January 2018 and a specific implementation deadline for existing plants under that Directive as 1 January 2028.

##### *1. The implementation regime applicable to TPP Morava under Directive 2001/80/EC*

- (32) According to Article 4(3) of Directive 2001/80/EC, Contracting Parties are under an obligation to achieve significant emission reductions of emissions of sulphur dioxide, nitrogen oxides and dust from large combustion plants by 1 January 2018 at the latest. There are two alternative avenues for Contracting Parties to implement Directive 2001/80/EC for existing plants, namely a) by complying with the emission limit values stipulated in Parts A of Annexes III to VII at individual plant level (compliance with Article 4(1) and point a) of Article 4(3)), or b) by defining and implementing a National Emission Reduction Plan (hereinafter: "NERP"; compliance with *litera* (a) of Article 4(3)). The two implementation alternatives may also co-exist, as it is not mandatory to include all existing large combustion plants under the scope of the NERP, should the Contracting Party opt for that implementation alternative. In such a case, large combustion plants not covered

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<sup>18</sup> ANNEX 5.

<sup>19</sup> ANNEX 6.

<sup>20</sup> ANNEX 7.

<sup>21</sup> Fifth subparagraph of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

by the scope of the NERP must comply with Article 4(1) and point a) of Article 4(3) of Directive 2001/80/EC by meeting the relevant emission limit values listed in its Annexes III to VII on an individual basis.

- (33) Article 4(4) of Directive 2001/80/EC, however, provides a possibility for an exemption from the above compliance avenues established by Article 4(3) by allowing, for a limited period, non-compliance with the Directive's individual emission limit values. The preconditions of this exemption clause are specified in Article 4(4) of Directive 2001/80/EC,<sup>22</sup> namely the submission of a written declaration by the operator of an existing large combustion plant as defined by Article 2(9) of Directive 2001/80/EC<sup>23</sup>, not to operate the plant for more than 20,000 operational hours starting from 1 January 2018 and ending not later than 31 December 2023<sup>24</sup> and the authorization of the Ministerial Council in the form of a decision<sup>25</sup>.
- (34) Article 4(4) of Directive 2001/80/EC is an expression of flexibility within the compliance regime established by the Directive. The option to "opt out" individual power plants provides for a significant extension of operational lifetime for large combustion plants. This extension was introduced for the benefit of operators which find it economically or technically impossible to implement emissions abatement measures. It is the very purpose of the additional 20,000 operational hours to allow Contracting Parties to prepare for this transition.<sup>26</sup>
- (35) In the case of TPP Morava, both conditions of Article 4(4) of Directive 2001/80/EC were met, the first one with the submission of the written declaration by EPS and the second one with the adoption of Decision 2016/19/MC-EnC. With the confirmation of the authorities of the Republic of Serbia on the start of the opt-out in 2018<sup>27</sup> and as the Reply to the Reasoned Opinion also confirms this fact,<sup>28</sup> it is therefore to be concluded that TPP Morava is subject to Article 4(4) of Directive 2001/80/EC.
- (36) In this context, however, the Reply to the Reasoned Opinion points out that *"based on the statements in the Reasoned Opinion for Case ECS-9/23, as well as the circumstances caused by energy crises and increasingly pronounced geopolitical instability, it is necessary to accept the new energy reality and jointly, within the framework of the Energy Community, find long-term sustainable solutions. In this case, such practice across multiple Contracting Parties of the Energy Community should not be viewed as a breach of the provisions of the Energy Community Treaty, but rather as a broader systemic issue that needs to be overcome together"*<sup>29</sup>.
- (37) In reply to that argument, the Secretariat respectfully submits that the role and the functions of the Secretariat are defined by Article 67 of the Treaty. Point (b) of that article mandates the Secretariat *"to review the proper implementation by the Parties of their obligations under this Treaty, and submit yearly progress reports to the Ministerial Council"*. As outlined above, the Secretariat has been doing precisely that prior to launching the present case by repeatedly recalling the approaching non-compliance with the provisions of Directive 2001/80/EC.<sup>30</sup>

<sup>22</sup> As amended by Decision 2013/05/MC-EnC.

<sup>23</sup> As amended by Decision 2013/05/MC-EnC.

<sup>24</sup> Point (a) of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

<sup>25</sup> Point (b) of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

<sup>26</sup> Common Position (EC) No 52/2000 of 9 November 2000, as adopted by the Council.

<sup>27</sup> See ANNEX 3.

<sup>28</sup> P. 1 of the Reply to the Reasoned Opinion.

<sup>29</sup> P. 7 of the Reply to the Reasoned Opinion.

<sup>30</sup> See, to that effect, the references provided in paragraph 26 above.

- (38) Furthermore, according to point (d) of Article 67 of the Treaty, the Secretariat shall “*carry out other tasks conferred on it under this Treaty or by a Procedural Act of the Ministerial Council, excluding the power to take Measures*”. As it is clear from the text of the Treaty, the Secretariat has no mandate to take Measures, either when it comes to the adoption of new ones or the amendment of existing ones, this being a prerogative of the Ministerial Council under primary Energy Community law. The opt-out list was established by a Decision of the Ministerial Council and it is therefore not only the Secretariat’s role, but also its obligation under point (b) of Article 67 of the Treaty to oversee the implementation of the Energy Community *acquis communautaire* in the Contracting Parties, including the Measures adopted by the Ministerial Council. To that end, the Secretariat also notes that this understanding was also confirmed by the European Commission in the course of 2022 in a case related to the same subject matter regarding two opted-out plants in Bosnia and Herzegovina.<sup>31</sup>

## 2. Expiry of the maximum of allowed operational hours under the opt-out regime

- (39) Article 4(4) of Directive 2001/80/EC allows for a period of non-compliance with the Directive’s individual emission limit values in case the operator of an existing large combustion plant undertakes, in the form of a written declaration, not to operate the plant for more than 20,000 operational hours starting from 1 January 2018 and ending not later than 31 December 2023. As explained above, this implementation alternative was chosen by the operator of TPP Morava, an existing plant in terms of Article 2(9) of Directive 2001/80/EC. The start of the plant’s opt-out was explicitly confirmed by the Ministry on 28 February 2018 to the Secretariat,<sup>32</sup> as also presented by the Reply to the Reasoned Opinion<sup>33</sup>.
- (40) Moreover, it is undisputed that from 1 January 2018 onwards, TPP Morava had 20,000 operational hours at its disposal to comply with the provisions of Article 4(4) of Directive 2001/80/EC. By the end of the 2022 reporting year, the plant has exceeded the maximum amount of operational hours available under Article 4(4) of Directive 2001/80/EC. This finding is based on the number of operational hours of TPP Morava provided to the Secretariat and the European Environment Agency in the framework of the reporting obligation under Annex VIII.B of Directive 2001/80/EC. Following the expiry of that time limit and in accordance with the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,<sup>34</sup> the plant could have remained in operation only if it has met the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.
- (41) It is also undisputed that since the end of 2022, TPP Morava has been in breach of Article 4(4) of Directive 2001/80/EC.
- (42) The state of non-compliance was further exacerbated in the course of 2023–2025, raising the total amount of operational hours spent in breach of the provisions of Article 4(4) of Directive 2001/80/EC to 12,791 by 31 December 2025.<sup>35</sup> The plant remains in operation and thus the total number of operational hours in breach of Directive 2001/80/EC will increase further in the course of 2026 and possibly beyond.
- (43) It is therefore an objective fact that TPP Morava, as a plant falling under the scope of Directive 2001/80/EC and operating under the opt-out regime of Article 4(4) thereof, has reached the limit

<sup>31</sup> See, to that effect, ANNEX 8.

<sup>32</sup> See ANNEX 3.

<sup>33</sup> Pp. 1-2 of the Reply to the Reasoned Opinion.

<sup>34</sup> As amended by Decision 2013/05/MC-EnC.

<sup>35</sup> P. 4 of the Reply to the Reasoned Opinion.

of 20,000 operating hours by the end of 2022 and has been operating since that point of time in breach of the provisions of Article 4(4) of Directive 2001/80/EC.

### 3. Compliance with emission limit values of Directive 2010/75/EU

- (44) According to the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,<sup>36</sup> from the point in time when a plant has been operating for 20,000 hours since 1 January 2018, it shall not be operated further, unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.
- (45) In the case of TPP Morava, this provision became applicable at the end of 2022, following the expiry of the 20,000 hours used under the opt-out regime. Consequently, TPP Morava may only have remained in operation beyond the 20,000 hours under the condition that it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.
- (46) In order to assess compliance with the emission limit values of Directive 2010/75/EU, the average emission concentrations expressed in mg/Nm<sup>3</sup> are to be estimated. This assessment was carried out by the Secretariat in the Opening Letter,<sup>37</sup> with the following results:

| Pollutant       | Emission concentrations of TPP Morava estimated by the Secretariat <sup>38</sup> |
|-----------------|----------------------------------------------------------------------------------|
| SO <sub>2</sub> | 13,998.3                                                                         |
| NO <sub>x</sub> | 666.6                                                                            |
| dust            | 33.4                                                                             |

- (47) From these results, it follows that the applicable emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU<sup>39</sup> are not met. It is thus to be concluded that the operation of TPP Morava after the 20,000 operational hours applicable under Article 4(4) of Directive 2001/80/EC is non-compliant.
- (48) To justify this breach, the Republic of Serbia first argues in its Reply to the Reasoned Opinion that “unforeseen circumstances arose at the global level due to a major energy crisis, which could not have been predicted and which significantly impacted the energy sector and, consequently, the entire economy of the Republic of Serbia”.<sup>40</sup> However, Article 4(4) of Directive 2001/80/EC establishes a clear and unequivocal *obligation de résultat*, by requiring that from the point in time when the plant has been operating for 20,000 hours since 1 January 2018, it shall not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive

<sup>36</sup> As amended by Decision 2013/05/MC-EnC.

<sup>37</sup> The calculation details were presented in Annexes 1 to 3 to the Opening Letter.

<sup>38</sup> Expressed in mg/Nm<sup>3</sup> based on the emission data submitted by the Republic of Serbia.

<sup>39</sup> 150 mg/Nm<sup>3</sup> for sulphur dioxide (or a minimum rate of desulphurisation of 97%), 150 mg/Nm<sup>3</sup> for nitrogen oxides (200 mg/Nm<sup>3</sup> in case of pulverised lignite combustion) and 10 mg/Nm<sup>3</sup> for dust.

<sup>40</sup> P. 4 of the Reply to the Reasoned Opinion.

2010/75/EU. Neither Directive 2001/80/EC itself, nor Decision 2013/05/MC-EnC of the Ministerial Council provides any exemption to this rule.

- (49) Secondly, the Republic of Serbia underlines in its Reply to the Reasoned Opinion the importance of TPP Morava in the operation of the national energy system, its links to economic conditions and considerations related to security of supply.<sup>41</sup> In this regard, the Secretariat submits that in accordance with the established case-law of the Court of Justice of the European Union, measures impinging on European rules and principles cannot be justified by purely economic aims.<sup>42</sup> Furthermore, the Secretariat reiterates also in relation to this argument that the *obligation de résultat* of Article 4(4) of Directive 2001/80/EC can only be complied with either by operating the plant in line with the time-limits established therein or by ensuring that it is capable to meet the relevant provisions of Directive 2010/75/EU, and does not permit for any considerations of security of supply justifying non-compliance with these provisions.
- (50) The Secretariat also recalls that investments in the modernisation of power plants, including emission abatement measures, can and should be reflected in the costs of the electricity produced by the operator and sold on the domestic and regional markets. Foregoing such investments because of social concerns not only amounts to the Republic of Serbia breaching the *acquis communautaire* but also affects the level-playing field for regional electricity trade and the life and health of its citizens. In reference to the price surges referred to in the Reply to the Reasoned Opinion in particular,<sup>43</sup> it is to be clarified that Energy Community law does not prevent the Republic of Serbia from providing compensatory liquidity support to the operators of large combustion plants and/or end customers of electricity as legitimate remedies to address price surges. In the European Union, this possibility was explicitly acknowledged in the European Commission's REPowerEU plan.<sup>44</sup> Breaches of the environmental *acquis*, however, were never and cannot be considered as legitimate remedies.
- (51) The consequence of the above is that the operation of TPP Morava is in breach of Article 4(4) of Directive 2001/80/EC, which is also confirmed by the Reply to the Reasoned Opinion<sup>45</sup>.

## V. Conclusion

- (52) Based on the above, the Secretariat respectfully submits that following the expiry of the opt-out period in the course of the 2022 reporting year, TPP Morava has neither been put out of operation or continued their operation at emission limits applicable to a new plant under Directive 2010/75/EU. This constitutes a breach of Article 4(4) of Directive 2001/80/EC, which cannot be justified by the arguments put forward by the Ministry.

## ON THESE GROUNDS

<sup>41</sup> P. 6 of the Reply to the Reasoned Opinion.

<sup>42</sup> See, inter alia, Cases C-288/83 *Commission v Ireland*, paragraphs 10 and 28. C-164/99 *Portugaia Construções*, paragraph 26 and C-324/93 *Evans Medical*, paragraph 36.

<sup>43</sup> P. 3 of the Reply to the Reasoned Opinion.

<sup>44</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU: Joint European Action for more affordable, secure and sustainable energy COM/2022/108 final, 8.3.2022, p. 3; see also Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.

<sup>45</sup> P. 5 of the Reply to the Reasoned Opinion.

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community that:

by maintaining the operation of TPP Morava after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), the Republic of Serbia fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

On behalf of the Secretariat of the Energy Community,

Vienna, 19 June 2026

A handwritten signature in black ink, reading "Artur Lorkowski".

Artur Lorkowski  
Director

A handwritten signature in blue ink, reading "Richter".

Marie-Therese Richter-Kuhnert  
Head of Legal Unit

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